

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig w/affidavit of mailing
75-7252
74-2561

To be argued by
PROSPER K. PARKERTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2561

ANDREW W. DASH,

—against—

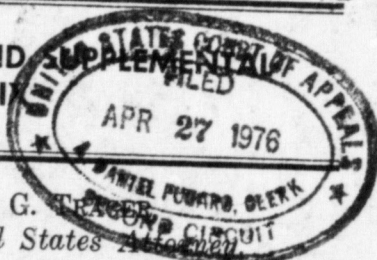
SECRETARY OF HEALTH, EDUCATION
and WELFARE,

B
P/S
Appellant,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE AND
APPENDIX



DAVID G. PARKER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
PROSPER K. PARKERTON,
Assistant United States Attorneys,
Of Counsel.

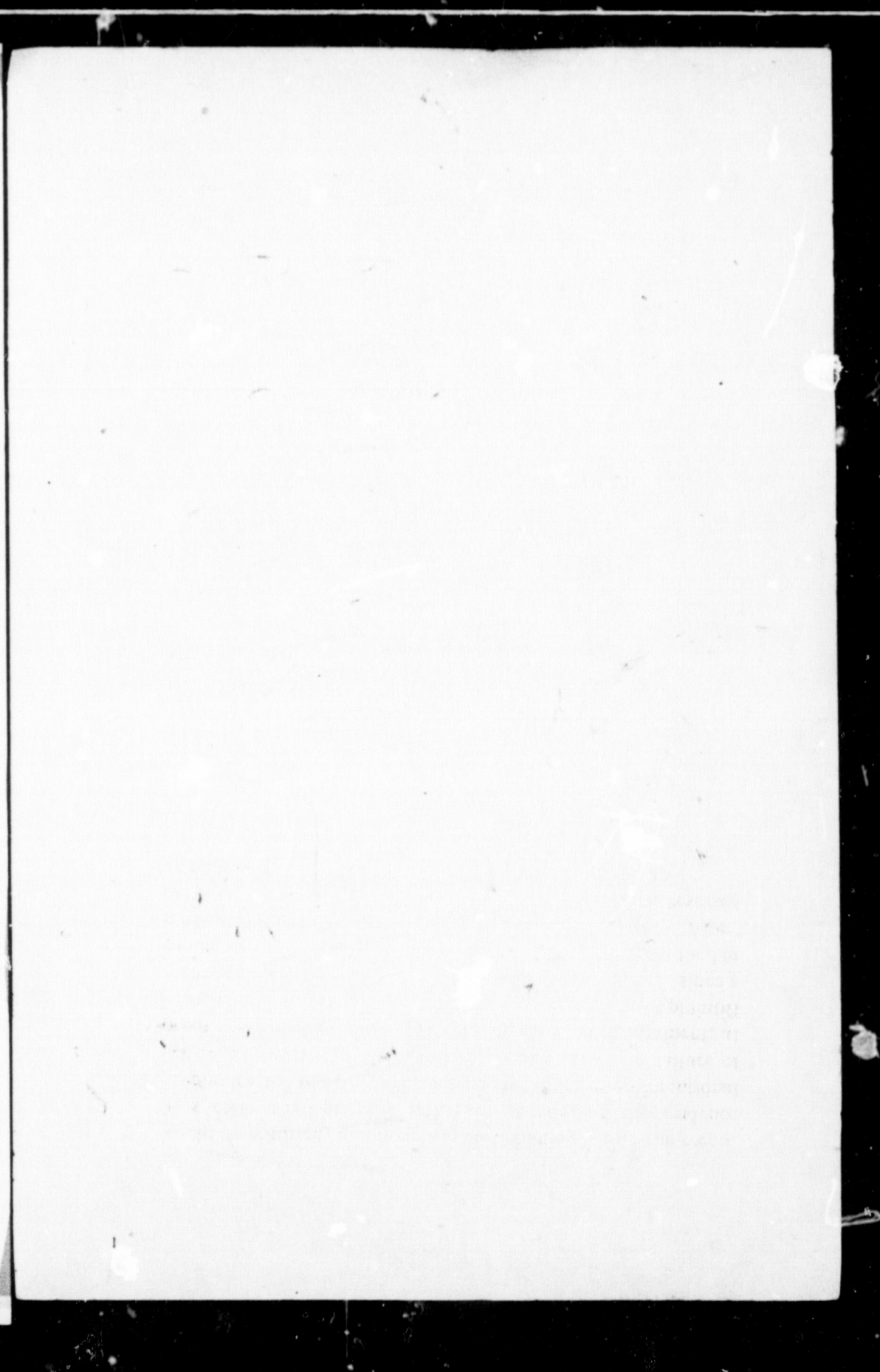
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2561

ANDREW W. DASH,

—against—

Appellant,

SECRETARY OF HEALTH, EDUCATION
and WELFARE,

Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by Andrew W. Dash, from an order of the United States District Court for the Eastern District of New York (Dooling, J.), entered March 12, 1975, in an action brought under Section 205(g) of the Social Security Act, as amended 42 U.S.C. § 405(g) (hereinafter "the Act"), to review a final decision of the Secretary of Health, Education and Welfare which denied plaintiff's application for a period of disability and disability insurance benefits. The order of the District Court granted defendant's motion for judgment on the pleadings and affirmed the decision of the Secretary.

In this *pro se* appeal, appellant repeats his claims of anxiety neurosis and various physical ailments. He asserts that these conditions, in combination with the effects of alleged racial discrimination, entitle him to dis-

ability benefits. It is the position of the Government that neither the anxiety neurosis nor his physical complaints, singly or in the aggregate, meet the test of disability under the Social Security Act.

Statement of the Case

On August 30, 1971, Andrew W. Dash filed an application (pursuant to Sections 216(i) and 223 of the Act, 42 U.S.C. §§ 416(i) and 423)¹ for disability insurance

¹ Section 223 of the Act, 42 U.S.C. § 423 provides in pertinent part:

- (a) (1) Every individual who—
 - (A) is insured for disability insurance benefits (as determined under subsection (c) (1) of this section),
 - (B) has not attained the age of sixty-five,
 - (C) has filed application for disability insurance benefits, and
 - (D) is under a disability (as defined in subsection (d) of this section),

shall be entitled to a disability insurance benefit.

- (d) (1) The term "disability" means—

* * * * *

- (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or not less than 12 months,
- (2) For purposes of paragraph (1) (A)—
 - (A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would

[Footnote continued on following page]

benefits in which he claimed that he had been unable to work since October 12, 1970, because of "anxiety neurosis" (Tr. 121-124),² although he was diagnosed as having an anxiety neurosis as early as August 15, 1957 (Tr. 212-213). The Bureau of Disability Insurance of the Social Security Administration denied appellant's application initially (Tr. 125-126) and on reconsideration (Tr. 128-130), after the New York State agency upon evaluation of the evidence by a physician and a disability examiner had found that appellant was not under a disability (Tr. 142-145). Appellant requested a hearing (Tr. 32, 174-175) which was held on May 2, 1973 (Tr. 33-120).

The Administrative Hearing

At the hearing the appellant stated that he was born on September 10, 1924, was 5' 7" tall and weighed 180 pounds (Tr. 48). He quit school but subsequently ob-

be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

- (3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques.
- (5) An individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require.

The requirements of Section 216(i) relating to the establishment and continuation of a period of disability are substantially the same as the above quoted provisions of section 223.

² "Tr." refers to pages in the Administrative Record filed with this Court.

tained a high school equivalency certificate and completed two years of college including a semester of criminal justice courses. (Tr. 52-53).

Appellant's testimony on his vocational history shows that prior to his last job as a New York City fire fighter he had been employed as a grocery store clerk, coach lunch boy at the Pennsylvania Railroad Station, dishwasher, railroad baggage handler, municipal bus driver, bartender, automobile salesman, fire inspector and fire marshal. While in the Army, appellant was a cook, supply sergeant and mess sergeant (Tr. 54-58). Appellant was in the New York City Fire Department from June 6, 1958 to September 2, 1971, when he was retired for non-service connected disability (Tr. 65-79, 220).

He is presently active in five or six community action groups on a once a month basis (Tr. 91). He testified that he wanted to be involved in community activity and that he was capable of functioning with an organization that he felt was "meaningful" (Tr. 86). He stated that he owned and maintained his own home, lived in the basement apartment and rented the second and third floor apartments for a combined rental of \$226 a month (Tr. 91-92). He owned and drove a 1969 Pontiac automobile (Tr. 50). Appellant stated that he received monthly pensions of \$477 from the New York City Fire Department and \$307 from the Veterans Administration (Tr. 93). Therefore, at the time of the hearing his income was \$1040 a month from pensions and rents, although he claimed the rents did not cover mortgage and utility payments.

In his application for disability benefits, appellant alleged that he became unable to work on October 12, 1970, due to an anxiety neurosis (Tr. 121). The clinical records of the Veterans Administration Hospital, Brooklyn, New York, showed appellant was seen 14 times between May 29, 1969, and March 10, 1972, for psycho-

therapy and medication as treatment for his service connected anxiety reaction. A neuropsychiatric examination performed on November 5, 1971, showed appellant was "in good contact, coherent and relevant." He denied hallucination and suicidal ideation. He had periods of depression, tension and anxiety; had fear of heights and experienced abdominal symptoms when upset. He also was preoccupied with his health. He lived separated from his family but visited with them (Tr. 146-153).

A medical record, dated July 17, 1971, of the New York Diagnostic Center showed appellant had an enlarged liver, probably secondary to early cirrhosis. (Tr. 168-170). Liver function tests were normal and there was normal thyroid function.

Dr. A. Moore, a medical specialist in psychiatry and neurology (Tr. 172), reported that when appellant was seen on June 23, 1972, he was neatly dressed, appeared his stated age and made good contact. He was articulate, logical and coherent. Psychomotor activity was also normal. His thought content showed concern with injustices done to himself and other blacks because of race. Even though he denied paranoid ideation, paranoid trends were evident in his thinking. He experienced anxiety attacks brought on by stress with resulting palpitations, sweating and shortness of breath. He obtained relief by taking of deciation which acted in a matter of minutes. The diagnostic impression was anxiety neurosis-chronic. (Tr. 171-172).

The Attending Physician's Statement of Disability prepared and completed by Dr. W. H. Goins indicated appellant's blood pressure was 100/90 and gave a diagnosis of: (1) anxiety neurosis, (2) enlarged liver and (3) hypertension (Tr. 183-184). On a similar form, Dr. D. W. King reported appellant was seen from November 3, 1970, to May 25, 1971, for a Bennett fracture of the right

first metacarpal. Dr. King further noted that appellant was not totally disabled for any occupation (Tr. 185-186).

Medical records of the Brooklyn Veterans Administration Hospital disclose that appellant was seen in an outpatient capacity from July 26, 1972, to February 14, 1973, mostly for psychiatric care. A general examination done on September 7, 1972, resulted in a diagnosis of (1) anxiety state, (2) labile blood pressure. Results of a physical examination performed on February 14, 1973 were within normal limits. (Tr. 197-202).

Mr. A. I. Bierman, Executive Director of the Occupational Center of Essex County (Tr. 96), appeared and testified at the hearing as a vocational expert (Tr. 95). He considered appellant's vocational capacity after having observed him and listened to his testimony. Based on the assumption that appellant was not physically impaired and could perform all body functioning well, the vocational expert concluded that appellant could work as a guard, bus driver, truck driver, taxicab driver, desk officer, bartender, and automobile salesman (Tr. 102). These jobs according to the vocational expert, existed in significant numbers in the metropolitan area of New York City (Tr. 102-103). However, he expressed the further opinion that *if* appellant had the limitations of function he asserted in his testimony, he would have difficulty in maintaining employment (Tr. 101).

The Administrative Law Judge, before whom the appellant and the vocational expert testified, considered the case *de novo*, and on June 12, 1973, found that appellant was not under a disability (Tr. 14-28). In her decision, the Administrative Law Judge made specific findings concerning the claimant's alleged psychiatric problem and his recurrent physical concern:

4. The claimant has an enlarged liver. This condition is a mild one in that all liver function tests have consistently remained normal.
5. The claimant has an emotional impairment in the nature of an anxiety neurosis which has not been shown to be of such severity as to preclude engagement in occupational pursuits. (Tr. 27)

Appellant's counsel submitted for the Appeal's Council's consideration additional materials (Tr. 214-230), including the psychiatric examination report of Dr. E. I. Pinney who saw the appellant on March 25, 1971. Dr. Pinney described appellant as preoccupied, tense and excessively and unnecessarily concerned. He was oriented and exhibited no sign of an overt psychosis. However, he gave a history of difficulty in getting along with his supervisors while working for the Fire Department in more than one capacity. He complained that he was "removed from details within the job due to racial overtones." Dr. Pinney found that appellant had an anxiety reaction which was chronic and severe and related, to some extent, to his concern about being maltreated as a Negro. He did not believe that appellant would ever be able to resume full duties in the Fire Department. (Tr. 225).

The Administrative Law Judge's decision became the final decision of the Secretary of Health, Education and Welfare, after the Appeals Council considered all of the evidence and approved the decision of the Administrative Law Judge on January 29, 1974 (Tr. 4). Appellant commenced an action for judicial review of the decision in the United States District Court on March 26, 1974.³

³ Section 205(g) of the Act, as amended 42 U.S.C. § 405(g), which governs such judicial review, provides in pertinent part:

[Footnote continued on following page]

ARGUMENT

The District Court correctly held that the Secretary's Decision Denying Appellant Disability Insurance Benefits was supported by substantial evidence.

The law provides that if a claimant is to qualify for disability insurance benefits he must establish an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which has lasted or can be expected to last for a continuous period of not less than 12 months" 42 U.S.C. § 423(d)(1)(A). A medically determinable physical or mental impairment is an impairment that results from an anatomical, physiological, or psychological abnormality which is demonstrable by medically acceptable clinical and laboratory diagnostic techniques 42 U.S.C. § 423(d)(3). See *Peterson v. Gardner*, 391 F.2d 208 (2d Cir. 1968); *Walters v. Gardner*, 397 F.2d 89 (6th Cir. 1968); *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966). It must also be shown that the impairment is severe enough to preclude the claimant from engaging in any substantial gainful activity, *Franklin v. Secretary of Health, Education, and Welfare*, 393 F.2d 640 (2d Cir. 1968); *Celebrezze v. Bolas*, 316 F.2d 498 (8th Cir. 1963); and that the impairment is of such severity that the claimant,

. . . is not only unable to do his previous work but cannot considering his age, education, and work

-
- (g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow . . . The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . .

experience, engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d) (2) (A)

The claimant bears the burden of proving that he is entitled to disability insurance benefits under the Social Security Act, *Franklin v. Secretary of Health, Education, and Welfare*, *supra*; *Ragan v. Finch*, 435 F.2d 239 (5th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Miller v. Finch*, 430 F.2d 321 (8th Cir. 1970); the Secretary is not required to make an affirmative showing of non-disability. *Miller v. Finch*, *supra*; *Zimbalist v. Richardson*, 334 F. Supp. 1351 (E.D.N.Y. 1971). In the instant case, the appellant has failed to sustain the burden of proof.

In his application for disability insurance benefits appellant stated his disability was anxiety neurosis and that because of this disability he had become unable to work in October 1970. Nowhere does the record "disclose any significant intellectual, behavioral, or emotional regression or deterioration in connection with the anxiety neurosis." (Tr. 25). His condition, therefore, does not preclude him from engaging in any substantial gainful activity under the statutory definition. See *Reyes-Robles v. Finch*, 409 F.2d 84 (1st Cir. 1969).

Dr. Moore in June, 1972 made a diagnosis of anxiety neurosis, but noted that appellant was logical and coherent with no evidence of loosening of associations. The doctor also found appellant's insight was good and his judgment was preserved. In addition, Dr. Pinney who examined appellant in March, 1971, stated that he was oriented and showed no sign of overt psychosis. It should also

be noted that Dr. King had found that appellant was not totally disabled for any occupation.

The record reveals that appellant was diagnosed as having an enlarged liver; however liver function tests were normal and there was no medical evidence of liver dysfunction. (Tr. 170). The Administrative Law Judge considered the combination of appellant's liver condition and anxiety neurosis in determining that he was not entitled to disability insurance benefits (Tr. 25). Under analogous circumstances, where the claimed disability was anxiety neurosis and an abnormal curvature of the spine, the court found that the claimant was not under a disability. *Ragan v. Finch, supra*. And, chronic anxiety aggravated by frustration and bitterness due to the claimant's environment has not entitled a claimant to disability benefits. *Ryan v. Secretary of Health, Education and Welfare*, 393 F.2d 340 (9th Cir. 1968).

The decisions which appellant refers to in his brief do not support his position.⁴ In *Taddeo v. Richardson*, 351 F. Supp. 177, 179 (C.D. Cal. 1972), there were statements (1) by claimant's attending physician, that she was suffering from a "severe anxiety syndrome which made her completely disabled," (2) from a psychiatric evaluation, finding that her anxiety was of such severity that it "[made] it impossible for her to go anywhere. She [could] only stay at home or go places with her confidant, the woman who accompanied her to this clinic," and (3) from a hospital interviewer who noted the presence of "fears incapacitating [plaintiff] to the point that it is very diffi-

⁴ Appellant's brief, consisting of a two page mailgram addressed to Honorable John F. Dooling, Jr., does not provide citations to the cases he mentions but it is believed the citations given here are to the cases intended to be cited by the appellant.

cult for her to leave the house." On the basis of these facts the District Court found that the claimant had

met her burden of proving that during the period in question she was under a disability within the meaning of the Act, due to her suffering from a mental disorder of such severity that she was unable to go out of her apartment, even for one block, without breaking out into a cold sweat and suffering severe anxiety and fear. (*Id.*)

The claimant's mental condition in *Taddeo*, differs from appellant's for although he now declares in his brief "I never left the house alone or drove alone or have taken the bus or train without a companion," the statement is at variance with his testimony at the administrative hearing that he visited the corner bar and went to various community activities at least five or six times a month (Tr. 90-91).

In *Baker v. Richardson*, 327 F. Supp. 349 (M.D. Fla. 1971), an examining psychiatrist reported that the claimant suffered from chronic depressive reaction with a considerable amount of somatization and would not be able to return to gainful employment. The vocational expert, on the other hand, testified that the plaintiff was physically capable of performing light domestic work, but expressed doubts as to whether plaintiff's psychological ailments would prohibit her from engaging in the suggested employment. Here, the court was confronted with divergent and inconclusive expert testimony and remanded to the Secretary for clarification and supplementation of the psychiatric evidence.

Stone v. Finch, 434 F.2d 364 (4th Cir. 1970), also referred to by the appellant, not only involves a distinguishable fact pattern, but if it were applicable it would undercut the appellant's position. The appellate court

affirmed the district court's approval of the Secretary's denial of disability benefits. The hearing examiner had determined on the basis of a psychiatrist's report that the claimant's "chief trouble [was] idleness, which render[ed] him nervous, and which appear[ed] to be his chief enemy." Here there is no psychiatric evidence that any causal relationship existed between idleness and anxiety neurosis at the time the appellant claimed the disability commenced.

Furthermore, appellant's condition is remediable.⁵ A remediable condition is not a disabling impairment for the purpose of disability insurance benefits. *Knox v. Finch*, 427 F.2d 919 (5th Cir. 1970); *Stillwell v. Cohen*, 411 F.2d 574 (5th Cir. 1969). Appellant's condition does not disable him from performing numerous types of work activity. At the administrative hearing, the vocational expert specifically stated that work of this nature existed in the national economy as well as in the New York City metropolitan area. The relevance of such testimony has been repeatedly recognized by the courts. *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965); *Woods v. Finch*, 428 F.2d 469 (3d Cir. 1970); *Kyle v. Cohen*, 449 F.2d 489 (4th Cir. 1971).

Clearly, appellant's eligibility for pensions from the Veterans Administration and New York City Fire Department does not establish his claim to Social Security benefits. The criteria used in determining entitlement to disability benefits for these agencies are different from those applicable under Title II of the Social Security Act. Decisions of other agencies regarding findings of disability are not determinative of the issue of disability under Title II of the Social Security Act. 20

⁵ Dr. Moore stated that the attacks brought on by the anxiety reaction were treated by medication which acted in a matter of minutes.

C.F.R. § 404.1525; see *Zimbalist v. Richardson*, *supra*. Moreover, a determination that the claimant could perform only limited service and not full duty in the physically and emotionally demanding position of a New York City firefighter (Tr. 22a, 22b) has virtually no relevance to whether the claimant is disabled within the meaning of the Social Security Act.

Arguably, appellant's failure to engage in substantial gainful employment may be for reasons other than mental or physical disability, as suggested by his testimony:

Q. Do you get involved in community affairs?

A. Oh, yes. That's all I do. I don't intend to do anything else other than that either. I paid my dues. (Tr. 83-84)

* * * * *

Q. Do you think you should be subsidized by the Social Security disability benefits, so that you can do this community work?

A. That is different. Then I'm not doing it for money. I'm doing it because I want to. I just need a subsidy to maintain a moderate way of life. That's it. (Tr. 85)

* * * * *

Q. But you're capable of functioning in this type of work if you don't get a salary?

A. No. I didn't say that. I'm capable of functioning, where I am impressed by the integrity of the organization that is meaningful. They have to show me that they're meaningful and they're really trying to do the job. . . . (Tr. 86)

The Administrative Law Judge conscientiously evaluated all the facts. She considered not only appellant's psychoneurotic condition but also his asserted physical disabilities, primarily the liver ailment. All of these were

subjected to extensive medical evaluation. The results of the psychiatric diagnoses revealed no impairment which precluded gainful employment. As Judge Dooling observed in his Memorandum and Order, "the decision of the Administrative Law Judge [was] full, exact, careful and eminently fair." (p. 2).⁶

The decision of the Secretary that the appellant is not entitled to disability insurance benefits under the Social Security Act is supported by substantial evidence on the record as a whole and should be affirmed. See *Cutler v. Weinberger*, 516 F.2d 1282, 1285 (2d Cir. 1975); *Gold v. Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972); 42 U.S.C. § 405(g). Indeed, as Judge Dooling concluded in his Memorandum and Order,

There is no fair ground on which the Administrative Law Judge or the Secretary could have found that he was disabled within the meaning of the statute. (p. 3)

⁶Judge Dooling's Memorandum and Order of March 12, 1975 is attacked in Appellant's Brief. In view of the fairness and thoroughness of the Administrative Law Judge's consideration of the evidence, appellant's maiden reference on this appeal to the fact that he had no legal representation merits only minimal discussion. There is no requirement that the Secretary provide counsel for the claimant at a Social Security hearing. Here, it was claimant's own choice that he represent himself. No court has held that lack of counsel is good cause for reversing the decision of the Secretary if the claimant received a full and fair hearing. See *Goodman v. Richardson*, 448 F.2d 388 (5th Cir. 1971); *Toledo v. Secretary of Health, Education and Welfare*, 435 F.2d 1297 (1st Cir. 1971); *Domozik v. Cohen*, 413 F.2d 5 (3d Cir. 1969).

CONCLUSION

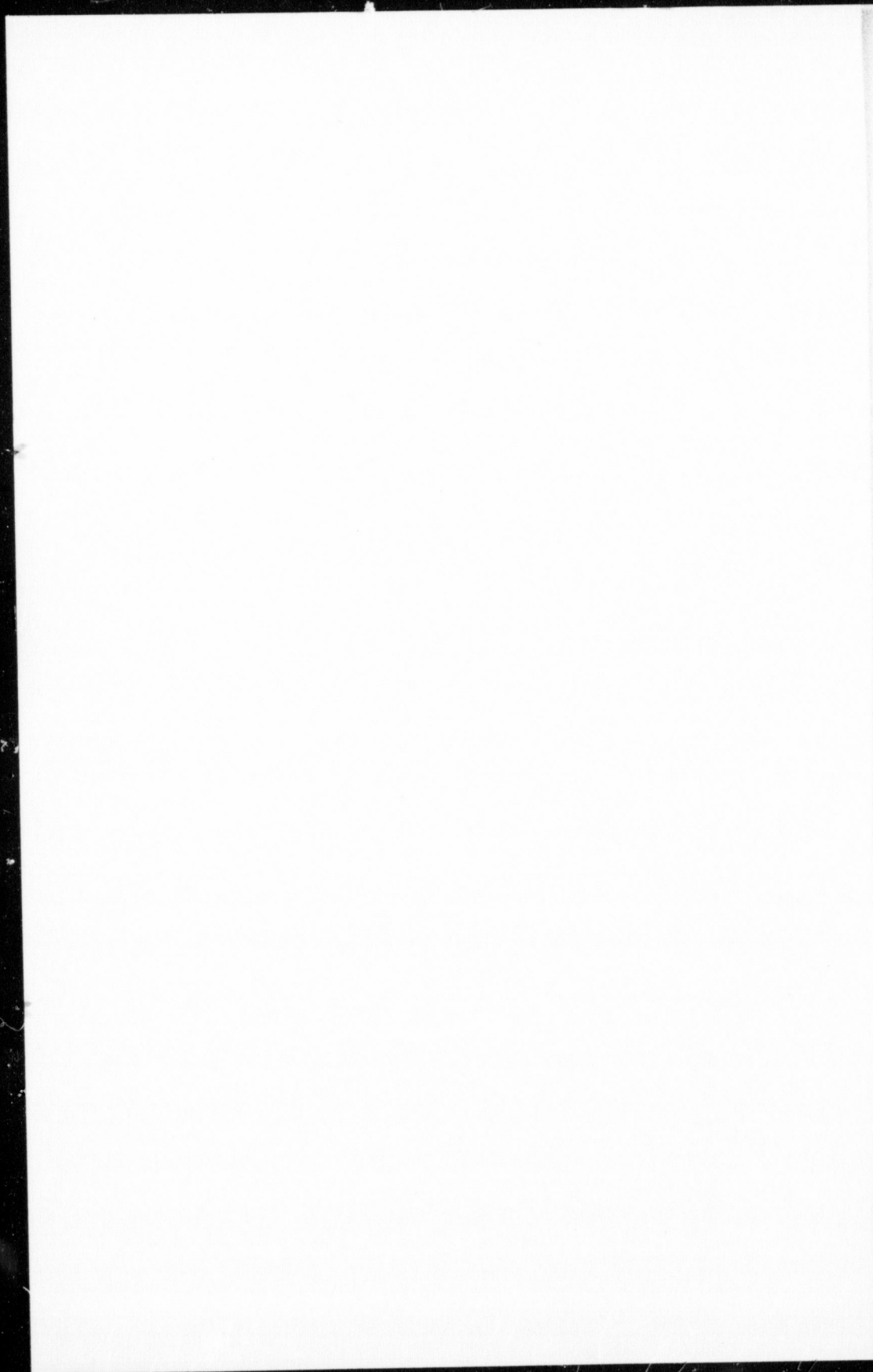
The decision of the District Court that there was substantial evidence to support the Secretary's decision denying appellant's application for disability insurance benefits was correct and should be affirmed in all respects.

Dated: Brooklyn, New York
April 23, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
PROSPER K. PARKERTON,
Assistant United States Attorneys,
Of Counsel.



APPENDIX

91.

Docket Entries

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
74 C 477

ANDREW W. DASH

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE OF THE UNITED STATES

TO REVIEW EXAMINER'S DECISION

<i>Plaintiff's Account</i>	<i>Received</i>	<i>Disbursed</i>
COMPLAINT	\$15.00	
Paid to Treas.		15.00
Notice of Appeal	5.00	
Paid to Treas.		5.00

<i>Date</i>	<i>Filings—Proceedings</i>
3-26-74	Complaint filed. Summons issued.
4- 2-74	Summons returned and filed/executed.
5-17 74	Notice of motion for order extending time to answer ret. 5-29-74 at 9:45 and memorandum of law filed.
5-29-74	Letter from plttf in opposition to motion for extension of time to answer complaint filed.

Docket Entries

- | <i>Date</i> | <i>Filings—Proceedings</i> |
|-------------|--|
| 5-29-74 | —Before DOOLING, J.—Case called for hearing on deft's motion for an extension of time to answer complaint. Motion granted until 7-24-74 and the deft is directed to file his motion for judgment promptly upon the filing of the administrative record. |
| 5-29-74 | —By DOOLING, J.—Order dtd 5-29-74 extending time to answer complaint to 7-24-74, etc. filed on back of document #3. |
| 7-24-74 | —ANSWER and records from HEW filed. |
| 8-17-74 | —By DOOLING, J.—Order requesting the parties to advise the court if either wishes to have a court hearing on the motion for summary judgment filed. |
| 10- 2-74 | —Notice of Motion, ret. Oct. 30, 1974 filed re: for a judgment granting judgment on the pleadings in favor of the deft & affirming the decision complained of. |
| 10- 2-74 | —Memorandum in Support of Deft's Motion for Judgment on the pleadings filed. |
| 10-30-74 | —Before DOOLING, J.—Case called for hearing on motion to dismiss complaint. Motion argued. Decision reserved. |
| 3-12-75 | —By DOOLING, J.—Memorandum and Order dtd 3-12-75 that the defts motion for judgment is granted and the Clerk is directed to enter judgment that the decision of the Secretary that plttf is not entitled to the establishment of a period of disability and disability insurance under 42 USC 416(i) and 423 is affirmed. See order. (postcards mailed to parties) |

Docket Entries

<i>Date</i>	<i>Filings—Proceedings</i>
3-13-75	JUDGMENT dtd 3-13-75 that the decision of the Sec'y that pltf is not entitled to the establishment of a period of disability and disability benefits under 42 USC 416(i) and 423 is affirmed and that the complaint is dismissed filed. (p/c mailed)
4-22-75	Notice of appeal filed
4-22-75	Docket entries and duplicate of notice of appeal mailed to court of appeals
8-20-75	Mailgram dtd 12-04-74 to J. Dooling from pltf filed.
8-22-75	Filed certified and mailed to C of A
8-29-75	Receipt for record on appeal ret and filed

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

-----EVELYN COHEN-----, being duly sworn, says that on the 26th-----
day of April, 1976-----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR APPELLEE AND SUPPLEMENTAL APPENDIX
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

-----Andrew Dash-----

-----959 Kent Avenue-----

-----Brooklyn, N.Y. 11205-----

Sworn to before me this
26th day of April, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3 50
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen